by one of their decisions could appeal to the secular courts and have them reversed."

This decision was recently characterized by this Court as one that "radiates * * * a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 116 (1952). The principle established, freedom of church government from state intervention, is so strong that it overrides such policies as majority control within private associations (*Kedroff* and *Watson* cases, *supra*), the prevention of fraud (*Ballard* v. *United States*, 322 U. S. 78 [1944]) and the sanctity of contracts (*McGuire* v. *Trustees of St. Patrick's Cathedral*, 54 Hun 207 [1889]).

The last named case shows an application of these principles to the operation of a cemetery by a church. The plaintiffs there asked the court to compel the defendant church trustees to permit burial of a deceased in the cemetery they operated, in accordance with a contract the deceased had made with them. The trustees refused on the ground that the deceased had not died in communion with the church. The court found that there was an implied condition in the contract that burial in the consecrated ground was limited to those dying in communion. It held, further, that only the church could decide whether the deceased had died in communion. It deemed this conclusion necessary "under a constitutional system which happily separates church and State" (54 Hun at 221).

The principle underlying these cases would operate as a sufficient safeguard against the danger the court below envisaged. Regardless of how the issue arose, under a contract or otherwise, a state court would not interfere with the operation of "church * * * burial places" (R. 37). Operation of a burial ground by a religious institution

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IN THE

Supreme Court of the United States

October Term, 1954

No. 28

EVELYN RICE, Petitioner,

v.

SIOUX CITY MEMORIAL PARK CEMETERY INCORPORATED, a Corporation, F. K. LYTLE and J. M. GUNNELL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

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INDEX

PAGE

Statement of Interest 1

Statement of the Case 2

The Question to Which This Brief is Addressed 3

ARGUMENT

POINT ONE — When a cemetery association limits burial rights to persons of a particular religious faith, the right to equal protection of the laws may have to be accommodated to the right to religious freedom 4

POINT TWO — The constitutional requirement of separation of church and state, in requiring that the state refrain from interference with the internal affairs of religious organizations, would prevent any court action compelling a religious organization to violate its tenets in the operation of a cemetery 8

Conclusion 10

Table of Cases

PAGE

Ballard v. United States, 322 U. S. 78 (1944) 9
Barrows v. Jackson, 346 U. S. 249 (1953) 3

Cantwell v. Connecticut, 310 U. S. 296 (1940) 7

Fowler v. Rhode Island, 345 U. S. 67 (1953) 5

Hirabayashi v. United States, 320 U. S. 81 (1943) 5

Johns v. State, 78 Ind. 832 (1881) 6

Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 (1952) 9,10
Korematsu v. United States, 323 U. S. 214 (1944) 5

Martin v. Struthers, 319 U. S. 141 (1943) 7
McGuire v. Trustees of St. Patrick's Cathedral, 54 Hun 207 (1889) 9,10

Oyama v. California, 332 U. S. 633 (1948) 5

Pierce v. Society of Sisters, 268 U. S. 510 (1925) 5

Schneider v. New Jersey, 308 U. S. 147 (1939) 7
Selective Draft Law Cases, 245 U. S. 366 (1918) 5
Shelley v. Kraemer, 334 U. S. 1 (1948) 3,4
Slaughter-House Cases, 83 U. S. (16 Wall.) 36 (1873) 4
Steele v. Louisville & N. R. Co., 323 U. S. 192 (1944) 4
Strauder v. West Virginia, 100 U. S. 303 (1880) 4
Swenson v. Michigan Employment Security Comm., Sup. Ct. of Mich., decided Sept. 20, 1954 6

PAGE

Tary v. Board of Review, Sup. Ct. of Ohio, decided March 31, 1954 6
Thornhill v. Alabama, 310 U. S. 88 (1940) 7

United Public Workers v. Mitchell, 330 U. S. 75 (1947) 5
United States v. Kauten, 133 F. 2nd 703 (C. C. A. 2, 1943) 5

Watson v. Jones, 80 U. S. 679 (1871) 8, 9
West Virginia v. Barnette, 319 U. S. 624 (1943) 6
Wieman v. Updegraff, 344 U. S. 183 (1952) 5

Other Authorities

Bouscaren & Ellis, Canon Law, Text and Commentary (1951), p. 685 6

Greenwald, Kol Bo al Aveloth, Encyclopedia on Rules of Mourning (1947) 6

New York Penal Law (McKinney's Consolidated Laws, Book 39) Section 2144 6

Pfeffer, Church, State and Freedom 6

Talmud, Tractate Gittin, 61a, Rashi's Commentary 6

5 Wigmore, Evidence, 2nd ed., Sec. 2395 6

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BRIEF OF AMERICAN JEWISH CONGRESS AS *AMICUS CURIAE*

Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The American Jewish Congress is an organization committed to the principle that the destinies of all Americans are indissolubly linked. Accordingly, it seeks to promote the civil and political equality of members of all racial, religious and ethnic groups.

The instant case brings to this Court a question concerning the application of constitutional principles to an instance of discrimination based on race. Mindful of the role of the *amicus curiae*, we have not sought to present

to this Court our own views on that issue; it was fully considered by the court below and has been briefed by the parties here. We file this brief *amicus* because the court below has suggested that the right to freedom from racial discrimination here asserted jeopardizes essential religious freedoms. The special concern with which this organization views protection of religious freedom prompts us to file this brief in which we deal with that point alone.

Statement of the Case

In August 1951, petitioner, Evelyn Rice, learning of the death of her husband, Sergeant John Rice, in action in Korea, entered into a written contract with the respondent, Sioux City Memorial Park Cemetery, Inc., for the burial of his body in its cemetery in Sioux City, Iowa. The contract limited burial to "members of the Caucasian Race." When Sergeant Rice's body arrived, funeral services were held in the cemetery and the body was then left for burial. Thereafter, respondents notified petitioner that they would not bury the body of her husband because they had learned that he was eleven sixteenths of American Indian ancestry. Ultimately, Sergeant Rice's body was buried in Arlington National Cemetery, by order of President Truman.

In December 1951, petitioner brought this action in an Iowa State District Court, claiming damages. Respondents, in defense, relied on the Caucasians only clause of the contract. Petitioner asserted, *inter alia*, that allowance of this defense by the courts would deprive her of equal protection of the laws as guaranteed by the Fourteenth Amendment. The trial court granted respondents' motion to dismiss and this action was affirmed, on appeal, by the Iowa Supreme Court. The case is here on writ of certiorari to that court.

The Question to Which This Brief is Addressed

Shelley v. *Kraemer*, 334 U. S. 1 (1948) and *Barrows* v. *Jackson*, 346 U. S. 249 (1953) establish that the Fourteenth Amendment bars state courts from granting enforcement, either by injunction or award of damages, to contractual clauses requiring discrimination on the basis of race or color. In the present case, petitioner contends, and respondents deny, that the rule of the *Shelley* case bars not only enforcement of discriminatory contracts but also reliance on discriminatory clauses as a defense to an action on a contract. In deciding this issue adversely to petitioner, the court below said that petitioner's argument, if upheld, would "abridge desirable individual rights of restriction in church and fraternal private burial places" (R. 37).

Thus it appears that the court below assumed that a decision holding that respondent cemetery could not effectively contract to discriminate on the basis of race would necessarily apply to a cemetery that sought to limit burial rights on the basis of religion. We address ourselves here solely to the question whether that assumption was valid. For reasons stated below, we believe that the two situations are not governed by identical constitutional considerations.

It is important to note that the consideration suggested by the court below would have had just as much validity in the original *Shelley* case. The difficulty is not created by the fact that a discriminatory contract clause is now relied on as a defense to, rather than as the basis of, an action on a contract, the only factor that distinguishes the case at bar from *Shelley*.

Thus, suppose a religious organization maintaining a cemetery in land that it had sanctified, sold a portion of it to a fraternal society under a contract limiting burial to

the bodies of persons who died in its own faith. Thereafter, the society sought to admit persons of other faiths to burial rights. If the religious organization brought suit to enjoin violation of its contract, the court would have to deny it relief unless the *Shelley* case were viewed as permitting the accommodation between constitutional rights that we suggest below.

We submit that the *Shelley* case need not be so construed. As we now show, the difficulty suggested by the court below is avoided when appropriate weight is given to the guarantee of religious freedom contained in the First Amendment, as made applicable to the states by the Fourteenth.

ARGUMENT

POINT ONE

When a cemetery association limits burial rights to persons of a particular religious faith, the right to equal protection of the laws may have to be accommodated to the right to religious freedom.

The primary purpose of the Fourteenth Amendment was to prohibit state action that discriminates on the basis of race or color. *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 81 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Accordingly, it has been established that "discriminations based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, 203 (1944); "* * * only the most exceptional circumstances can excuse discrimination on that basis in the face of the

equal protection clause * * * " *Oyama* v. *California*, 332 U. S. 633, 646 (1948).[1]

The question whether the Fourteenth Amendment prohibits state action that discriminates on the basis of religion has not, to our knowledge, been raised. This Court has twice stated, in dicta, that governments may not make such distinctions. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947); *Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952). Further, some of the cases arising under the guarantee of religious freedom may also be taken as condemning official religious distinctions. See, for example, *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953).

Yet it cannot be said that government is altogether barred from recognizing that some of its citizens have special needs because of their religious beliefs. In a number of situations, government does give religious groups special consideration necessary to prevent interference with their beliefs.

For example, persons whose religious convictions proscribe their bearing arms may constitutionally be exempted from military service while those who have no conscientious objections or who object on political or philosophical grounds are not. *Selective Draft Law Cases*, 245 U. S. 366 (1918); *United States* v. *Kauten*, 133 F. 2nd 703 (C. C. A. 2, 1943). The compulsory Sunday laws of many states expressly exempt from their operation, either in whole or in part, persons whose religious convictions compel them to observe a day other than Sunday as their sacred day of rest. New York Penal Law (McKinney's

[1] During the wartime evacuation of citizens of Japanese descent from the West Coast, this Court upheld Federal regulation based solely on race, upon finding that there was a danger of sabotage and espionage that might assist an enemy invasion. *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944). Even if these cases would be decided the same way today, which we doubt, they sanction racial distinctions only in case of "pressing public necessity." *Korematsu* case, 323 U. S. at 216.

Consolidated Laws, Book 39) Section 2144; *Johns* v. *State*, 78 Ind. 832 (1881); Pfeffer, *Church, State and Freedom*, pp. 235-236. In most states, a Sabbatarian may not be denied unemployment insurance benefits for refusing to accept employment requiring him to work on Saturday, although a non-Sabbatarian refusing such employment forfeits his right to benefits. *Tary* v. *Board of Review*, Supreme Court of Ohio, decided March 31, 1954; *Swenson* v. *Michigan Employment Security Commission*, Supreme Court of Michigan, decided September 20, 1954; Pfeffer, *Church, State and Freedom*, p. 598. For more than a century, by statute and judicial decision, witnesses have enjoyed a privilege as to confessions made to clergymen in the course of discipline enjoined by the rules or practice of the faith to which they belong, whereas no privilege is accorded to confessions made outside the discipline of a religious faith. 5 Wigmore, Evidence, 2nd ed., Section 2395. These illustrations are sufficient to show that no constitutional provision prohibits governmental distinctions necessarily made to protect the free exercise of religion.

As to a cemetery operated by a religious group, the state might well find it necessary to give effect to religious restrictions because to do otherwise would interfere with freedom of conscience. Orthodox Jews[2] and Catholics[3], to name but two faiths, regard burial as a religious rite and maintain plots of sanctified ground in which the burial of persons of other faiths is not permitted. State action that compelled such groups to violate their religious principles would offend against constitutional inhibitions. *West Virginia* v. *Barnette*, 319 U. S. 624 (1943); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

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[2] *Talmud, Tractate Gittin*, 61a, *Rashi's Commentary*; Greenwald, *Kol Bo al Aveloth*, Encyclopedia on Rules of Mourning (1947), p. 194.

[3] Bouscaren & Ellis, *Canon Law, Text and Commentary* (1951), p. 685.

A court might, of course, be asked to choose between conflicting claims of constitutional privileges under the equal protection and freedom of conscience guarantees. That would occur, for example, in the church cemetery situation suggested by the court below as well as in the situation suggested by us above in which the cemetery association is the plaintiff rather than the defendant. Such a case, however, would merely require application of the familiar principles that control the process of "weighing the two conflicting interests." *Cantwell* v. *Connecticut*, 310 U. S. 296, 307 (1940); *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943).

In resolving such a conflict, the courts will consider not only the relative importance of the conflicting objectives but also the extent of the threatened impairment of each. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe a protected freedom." *Cantwell* case, *supra*, 310 U. S. at 304 (emphasis supplied) "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." *Schneider* v. *New Jersey*, 308 U. S. 147, 161 (1939).

POINT TWO

The constitutional requirement of separation of church and state, in requiring that the state refrain from interference with the internal affairs of religious organizations, would prevent any court action compelling a religious organization to violate its tenets in the operation of a cemetery.

The considerations outlined above would apply to any party operating a cemetery according to religious principles that placed restrictions on who could be buried. Even more weighty considerations apply in favor of the right of restriction when a cemetery is operated by a church or other religious body.

The separation requirement of the First Amendment strictly limits government interference with the internal affairs of religious associations. In *Watson v. Jones*, 80 U. S. 679, 728-729 (1871), this Court said:

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. * * * The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved

is one of those "matters of church government" which the *Kedroff* decision describes as entitled to freedom from state interference. We believe that any court would hold, with the New York court in the *McGuire* case: "To attempt to exercise jurisdiction in such matters * * * would be the entering wedge whereby the symmetry of our governmental system with regard to church and State might readily be destroyed" (54 Hun at 221).

Conclusion

Petitioner's argument that the decision below should be reversed because it denied her equal protection of the laws as guaranteed by the Fourteenth Amendment may be sustained without abridging exercise of the constitutionally protected freedom of religion.

Respectfully submitted,

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